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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the area near a barn located well outside a fence that surrounds a ranch house is part of the "curtilage" of that house.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the court of appeals, dated May 7, 1982 (Pet. App. 16a-35a), is reported at 674 F.2d 1093. The opinion of the court of appeals on remand from this Court, dated July 16, 1985 (Pet. App. 1a-11a), is reported at 766 F.2d 880. The opinions dissenting from denial of rehearing en banc of the 1985 opinion (Pet. App. 39a-47a) are unreported. The order of January 17, 1986, vacating the 1985 opinion (Pet. App. 48a) is unreported. The opinion of February 4, 1986, reinstating the 1982 opinion of the court of appeals (Pet. App. 49a-51a), is reported at 782 F.2d 1226.

JURISDICTION

The judgment of the court of appeals on remand from this Court (Pet. App. 52a) was entered on September 26, 1985. The petition for a writ of certiorari was filed on December 10, 1985. The new judgment of the court of appeals following the order vacating the 1985 opinion (Pet. App. 52a) was entered on February 4, 1986, and the supplement to petition for a writ of certiorari was filed on

April 7, 1986. The petition for a writ of certiorari was granted on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, respondent Dunn and his co-defendant, Robert Carpenter, were convicted on one count of conspiracy to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. 846 (Count One). Respondent was also convicted of manufacturing the two controlled substances (Counts Two and Three), and of possessing amphetamine with intent to distribute it (Count Four), all in violation of 21 U.S.C. 841(a)(1) (Pet. App. 16a-17a). Respondent was sentenced to consecutive terms of four years' imprisonment on each of the four counts, and three years' special parole on Counts Two through Four. He also was fined $10,000 on each count (10 R. 17-18). The court of appeals affirmed Carpenter's convictions but reversed those of respondent (Pet. App. 16a-35a). On May 21, 1984, following the decision in *Oliver* v. *United States*, 466 U.S. 170 (1984), this Court granted the government's petition for a writ of certiorari (No. 82-508), vacated the judgment reversing respondent's convictions, and remanded for reconsideration in light of the *Oliver* case. 467 U.S. 1201 (1984). On remand, the court of appeals again reversed respondent's conviction (Pet. App. 1a-11a). After the United States petitioned for a writ of certiorari, the court of appeals vacated the opinion it had written on remand and reinstated the original opinion reversing respondent's conviction, which the court had written in 1982 (Pet. App. 48a-52a).

1. The evidence is detailed in the two opinions of the court of appeals. In the summer of 1980, agents of the Drug Enforcement Administration (DEA) were conduct-

ing surveillance of Carpenter, who was continually ordering large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone, substances controlled by federal law. The equipment included several hot plate stirrers, electric heating devices that apply heat to a container and magnetically stir the contents. Stirrers are used in the "cooking" of chemicals. Pet. App. 17a-18a.

On September 3, 1980, DEA Agent Robert Surovec obtained a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a hot plate stirrer that Carpenter had ordered. The beeper was then installed and activated. After Carpenter picked it up, the stirrer was tracked to his residence in Spring, Texas. The signal from this beeper was lost several days later. Meanwhile, warrants were obtained for the installation of beepers in a 55-gallon plastic drum of acetic anhydride and in a container of 100 pounds of phenylacetic acid, both ordered by Carpenter. Both beepers were installed, and the chemicals were delivered to Carpenter. The two beepers were monitored from October 27, 1980, until November 5, 1980. On November 5, agents tracking the beeper in the 100-pound container followed a pickup truck that Carpenter drove from Houston to respondent's ranch near Johnson City, Texas. At that time, the signal from the beeper that had been installed in the hot plate stirrer was detected again. That signal also came from the Dunn ranch. Pet. App. 18a-19a.

DEA agents took aerial photographs of the ranch that afternoon. The photographs showed a ranch house at the end of a private driveway about one-half mile from a public road. A small greenhouse was adjacent to the main residence, and a windmill, a water tank, and two barns were approximately 50 yards from a fence that surrounded the house. The overhead view of the ranch is depicted in a chart reprinted at Pet. App. 51a. The photograph showed

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that the pickup truck driven by Carpenter was backed up to one of the barns. The entire ranch, about 198 acres in area, was encircled by a barbed-wire perimeter fence, and there were several other "typical ranch type" (J.A. 25) interior fences, including the one around the residence. The entrance to the private driveway was barred by a locked chain. Pet. App. 3a, 19a, 51a; GXs 1-2; J.A. 12, 26-28, 41.

At about 9 or 10 p.m. on November 5, 1980, DEA Agent Ronald Gospodarek and Officer Martin Fite of the Houston Police Department entered the Dunn ranch by crossing the outer perimeter fence. They tried to make their way toward the barns behind the ranch house, but they became disoriented in the dark. Eventually, they came to the driveway leading to the residence, and from there they approached a fence at the rear of the ranch house. There Agent Gospodarek smelled a strong odor of phenylacetic acid, a precursor of phenylacetone. The officers crossed another fence and looked into an open pole barn, where they saw only empty boxes. Continuing to follow the odor, they approached a second barn, where they heard the sound of a motor running. One end of the barn was open, but the entrance was blocked by a wooden, waist-high gate, which was closed and locked. Some type of netting hung from a tin overhang down to the gate. Standing outside the gate and shining their flashlights into the open side of the barn, the officers saw chemical equipment that appeared to be a phenylacetone laboratory. Pet. App. 3a-4a, 19a-20a; J.A. 12-19, 24-27, 36-37, 40-42; GXs 5-6.

Agent Gospodarek and Officer Fite then left the ranch property. At no point while that they were on the ranch did Gospodarek or Fite cross the fence around the ranch house or enter any of the ranch buildings. After they reported their findings, an affidavit for a warrant to search the property and buildings was prepared. The affidavit included the information obtained from the entry onto the property. The warrant was issued on the evening

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of November 6, 1980, and executed on the morning of November 8, 1980. Respondent was arrested, and the chemicals and equipment were seized. Pet. App. 4a-5a, 22a; J.A. 19-20, 38-39.

2. a. The court of appeals reversed respondent's convictions, holding that the evidence seized pursuant to the search warrant should have been suppressed because the warrant was based on information obtained during an unlawful warrantless entry onto respondent's land (Pet. App. 16a-35a).[1] The court rejected the contention that the search was lawful under the "open fields" doctrine; the court held that the barn was "within the curtilage of the residence," apparently because both the ranch and the barn were surrounded by fences (Pet. App. 23a-29a). The court assumed that the government had probable cause to search the ranch, but it held that a warrant was required for the entry and search (*id.* at 29a-33a).

b. The government sought review in this Court while *Oliver* v. *United States, supra*, was pending. Shortly after the decision in *Oliver*, this Court vacated the decision of the court of appeals and remanded for reconsideration in light of that case (467 U.S. 1201 (1984)). On remand, the court of appeals stated that "[t]he lessons of *Oliver* are clear as applied to a part of the instant inquiry" (Pet. App. 6a). The court therefore abandoned its prior holding that the agents had entered onto the curtilage by crossing the outer fences of the ranch (*id.* at 5a-8a). The court concluded that in light of *Oliver* the barn "was not within the protected curtilage of the Dunn ranch house" (*id.* at 7a-8a). The court, however, went on to state that the barn was not an open field and "ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy" (*id.* at 10a). The court found that respondent had taken such

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[1] Because Carpenter had no legitimate expectation of privacy in the ranch, his convictions were affirmed (Pet. App. 23a, 35a).

steps and concluded that the officers' visual "search" of the barn from their exterior vantage point required a warrant (*ibid.*). Accordingly, the court again reversed respondent's convictions on the ground that the evidence seized from the barn should have been suppressed.

c. The government's petition for rehearing with suggestion for rehearing en banc was denied in November 1985 (Pet. App. 14a-15a, 38a-39a). In December 1985, six judges of the court of appeals issued three separate opinions dissenting from the denial of rehearing en banc (*id.* at 39a-47a). In January 1986, the panel sua sponte vacated its second opinion (*id.* at 48a). In February 1986, the panel issued a short per curiam opinion stating without explanation that "[u]pon further collegial consideration" the panel had concluded that, contrary to the position the court took in its opinion on remand from this Court, "the barn was inside the protected curtilage" of the ranch house (*id.* at 50a). The panel then reinstated its original opinion of May 1982 (*ibid.*).

SUMMARY OF ARGUMENT

It has long been held that the Fourth Amendment's protection against unreasonable searches of residences extends not only to the home itself but also to the "curtilage" around the home. It is necessary to extend the Amendment's protection beyond the strict confines of the home in order to protect the individual's legitimate expectations of privacy within the home and in the private areas of intimate family activity immediately adjacent to the home. The curtilage concept protects these expectations. Historically, the area of home life extended to outdoor buildings (such as separate kitchens and "outhouses") necessarily associated with the dwelling, and those buildings came to be regarded as part of the curtilage. But the typical home no longer depends on such separate

buildings for the daily activities of home life, and neither the common law roots of the curtilage concept nor the Fourth Amendment values reflected in this Court's decisions require that the concept be extended to protect such outbuildings as distant barns. Instead, the curtilage of a home should be construed narrowly to extend only to the limited area that immediately surrounds and is closely associated with the home and the intimate activities of family life.

To give concrete meaning to this concept, and to make it administrable by law enforcement officers in the field, the Court should make it clear that the curtilage never extends beyond the nearest fence surrounding a residence. The curtilage originally and historicaily was a fenced-in area surrounding a residence, and other tests to determine whether an area is within the curtilage have arisen only because of the need to define the curtilage in the absence of a fence or in cases where the fence is too distant for the entire area within it to be called curtilage. American cases are consistent in recognizing that areas and buildings within a small common enclosure with the dwelling are within the curtilage, and that areas and buildings outside such an enclosure are not. Therefore, a bright-line rule for fenced property is appropriate. No other rule would be consistent with the observation by this Court in *Oliver* v. *United States*, 466 U.S. 170, 182 n.12 (1984), that, "for most homes, * * * the curtilage will be clearly marked."

Even if the balancing test developed in the courts of appeals rather than a bright-line rule is employed, the barn in this case fell outside the curtilage. It was separated from the house by a fence, it was in no way associated with the intimate activities of family life, and it lay a considerable distance away from the house. Thus, all three factors used by the courts of appeals point toward a determination that the barn was not within the curtilage. Accordingly, the officers did not violate the Fourth Amendment by peering into the barn.

ARGUMENT

RESPONDENT'S BARN WAS NOT WITHIN THE "CURTILAGE" SURROUNDING HIS HOME

A. THE CURTILAGE OF A HOUSE SHOULD BE DEFINED NARROWLY, IN KEEPING WITH ITS COMMON LAW RATIONALE AND THE DECISIONS OF THIS COURT

The curtilage concept is an important feature of the Fourth Amendment's protection against unreasonable searches and seizures. Because the Fourth Amendment limits its "special protection * * * to the people in their 'persons, houses, papers, and effects' " (*Hester* v. *United States*, 265 U.S. 57, 59 (1924)), the Amendment does not restrict searches and seizures of open fields outside a person's house.[2] The house, however, has been construed in Fourth Amendment law to mean more than a single structure with four walls. Instead, courts have extended Fourth Amendment protection to the curtilage; and "they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual may expect that an area immediately adjacent to the home will remain private" (*Oliver* v. *United States*, 466 U.S. 170, 180 (1984)).

Unquestionably, there are areas beyond the four walls of a house that deserve Fourth Amendment protection. An individual has an expectation, which society is prepared to recognize as reasonable (see *Oliver*, 466 U.S.

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[2] *Oliver* v. *United States*, 466 U.S. 170, 176 (1984); see Amsterdam, *Reflections on the Fourth Amendment*, 58 Minn. L. Rev. 349, 356 (1974) (footnote omitted) (" '[S]earches' and 'seizures' are not regulated by the fourth amendment except insofar as they bear the requisite relationship to 'persons, houses, papers, and effects.' "); Moylan, *The Fourth Amendment Inapplicable Vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. Ill. U.L. Rev. 75, 92 ("The fourth amendment is simply not 'out there' in the open fields.").

at 177), that the police will not trespass over an area closed to the public in order to peer through a window into his home.[3] A small back yard surrounded by a high fence is "intimately linked to the home, both physically and psychologically" (*California* v. *Ciraolo*, No. 84-1513 (May 19, 1986), slip op. 5), and thus enjoys Fourth Amendment protection from physical invasion. The concept of curtilage is appropriately invoked to support the Fourth Amendment protection given these areas.[4]

There was a time when "the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*Oliver*, 466 U.S. at 180 (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)) extended beyond a small, fenced back yard and the area from which one could peer through windows. In contrast to the typical modern home, which contains indoor facilities for sleeping, eating, and sanitation, the home of bygone days often included an outdoor privy and perhaps a separate kitchen or smokehouse, fully deserving of the protection against invasions of privacy that flows from being within the curtilage.

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[3] See, *e.g.*, *Texas* v. *Gonzales*, 388 F.2d 145, 147-148 (5th Cir. 1968); *Brock* v. *United States*, 223 F.2d 681, 685 (5th Cir. 1955) (footnote omitted) ("Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."). By contrast, the Fourth Amendment does not forbid police officers to approach the house by a driveway or walkway that is open to the public and observe what the public may observe. See, *e.g.*, *United States* v. *Ventling*, 678 F.2d 63 (8th Cir. 1982); *United States* v. *Magana*, 512 F.2d 1169 (9th Cir. 1975).

[4] The curtilage may not, however, receive the same "degree" of Fourth Amendment protection as "the home itself" (*Oliver*, 466 U.S. at 180 n.11; see United States v. *Smith*, 783 F.2d 648, 651-652 (6th Cir. 1986); *United States* v. *Roberts*, 747 F.2d 537, 540-543 (9th Cir. 1984)). For example, the curtilage does not enjoy protection from aerial surveillance. *California* v. *Ciraolo*, *supra*.

It was to protect those dwelling areas from invasion that the concept of curtilage first emerged as part of the law of burglary. At common law, the offense of burglary consisted of breaking and entering into a "mansion house" at night with felonious intent (4 W. Blackstone, *Commentaries* *223-224). The "mansion house" was deemed to include "all it's branches and appurtenants, if within the curtilage or home-stall" (*id.* at *225) on the theory that these were part of "a man's castle of defence" (*ibid.*). According to Blackstone, a "distant barn" was not part of the curtilage, but burglary could be committed in a "barn * * * parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous" (*ibid.* (footnote omitted)). American courts followed the English precedent of holding that breaking into the curtilage was burglary, but that breaking into more distant portions of a piece of property was not. See, *e.g.*, *Wright* v. *State*, 12 Ga. App. 514, 77 S.E. 657 (1913) (breaking into smokehouse 200-300 yards from dwelling is not burglary); *State* v. *Sampson*, 12 S.C. 567 (1880) (breaking into millhouse 75 yards from dwelling, on opposite side of public road and not enclosed by a fence, is not burglary). Judge Charles Moylan summarized the reason for the development of the common law concept of curtilage as follows (Moylan, *supra* note 2, 1977 So. Ill. U.L. Rev. at 87):[5]

> Th[e] dwelling area—called the curtilage—was readily discernible when the kitchen, the laundry, the springhouse, the woodshed, and most particularly the "outhouse" were not within the four walls of the mansion house. A man of the 19th Century * * * had the same right to resent being surprised by an intruder at 3 a.m. as he walked down the garden path to the privy as

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[5] See also Comment, *Curtilage or Open Fields?:* Oliver v. United States *Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. Pitt. L. Rev. 795, 813 (1985).

> a man of the 20th Century * * * has a right to resent being surprised by an intruder at 3 a.m. as he walks down the hall to the bathroom. The expectation of privacy is a constant; only the location of the "facility" has changed.

Because the typical structure of residences has changed, the interpretation of the term "curtilage" most faithful to its common law origins is a narrow one. Rarely, in modern times, will outbuildings separate from the dwelling itself be so intimately connected with family life that they have that heightened expectation of privacy that led the common law to make their invasion a burglary and has led this Court to give them special protection against searches and seizures.[6]

In its applications of the concept of curtilage, this Court has never embraced an expansive definition of the term. The Court in *Hester* v. *United States, supra,* rejected an argument (see Br. for Plaintiff in Error at 6-7) that property 50 to 100 yards from a house was within the curtilage and was therefore protected by the Fourth Amendment from trespass by law enforcement officers. The Court, however, did not define the concept in *Hester*, or even refer to the "curtilage" concept by name.

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[6] Of course, even in modern times there will be some outbuildings that share with the home itself the requisite connection to the intimate activities of family life and will remain protected as part of the "dwelling area," or curtilage, even under a narrow reading of the term. Most obviously, a rural home that still depends on separate facilities for some of the essential functions that are now generally carried on indoors will be entitled to have those facilities protected as curtilage. In addition, some outbuildings even on the grounds of more typical modern homes may be shown to be used as part of the home itself. See, *e.g.*, *Fox* v. *State*, 179 Ind. App. 267, 270-271, 384 N.E.2d 1159, 1163 (1979) (converted barn that was insulated, paneled, and equipped with furnace, telephone, and stereo was used for family purposes and was therefore part of curtilage).

Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U.S. 497 (1961), first suggested the rationale behind Fourth Amendment protection of the curtilage. He explained that, "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect *the privacies of the life within*. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights." 367 U.S. at 551 (emphasis added). The more recent descriptions of curtilage in *Oliver,* in *California* v. *Ciraolo, supra*, and in *Dow Chemical Co.* v. *United States*, No. 84-1259 (May 19, 1986), similarly refer to the curtilage not so much as a protected area in itself but as an area whose protection is vital to the privacy of home life.

The *Oliver* Court described curtilage as "the land immediately surrounding and associated with the home" (466 U.S. at 180). Consistent with the view that curtilage describes the "dwelling area" in which persons engage in private activities associated with the home, the Court referred to curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*ibid.* (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)). Curtilage, the Court added, could be described as "an area immediately adjacent to the home [that an individual reasonably may expect] will remain private" (*ibid.*). See also *id.* at 182 n.12, 183 n.14.

The *Ciraolo* Court described the term in much the same way: the Court noted that the fenced-in back yard determined to be curtilage in that case was "intimately linked to the home, both physically and psychologically" (slip op. 5). And in *Dow*, the Court described curtilage in similarly restrictive terms, referring to it as an area involving "intimate activities associated with family privacy" (slip op. 9),

and as "an area immediately adjacent to a private home, where privacy expectations are most heightened" (*id.* at 9 n.4).[7]

In sum, the definitions of curtilage used by this Court focus on the intimate activities of family life and the protection of a limited area that immediately surrounds and is closely associated with the home. This Court has described as curtilage only a fenced-in back yard (*California* v. *Ciraolo, supra*), a garage a few feet from a residence (*Scher* v. *United States*, 305 U.S. 251, 253 (1938)), and a store associated closely with a home (*Amos* v. *United States*, 255 U.S. 313, 314 (1921)). It has regarded a field 50 to 100 yards distant from a home as being outside the curtilage (*Hester* v. *United States, supra*). In this day and age, outbuildings such as a barn will seldom be the setting for intimate family activities. Instead, the barn and the area immediately around it are likely to be used for activities such as the storage of machinery and the shelter and nurture of animals. Thus, the Court should look askance on efforts to give to the area around an outbuilding or barn—and particularly an outbuilding or barn 50 yards or more from the home—the protection afforded to curtilage by the Fourth Amendment.

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[7] The dissenters in *Ciraolo* and *Dow* adopted an equally restrictive definition of the term "curtilage." In *Ciraolo*, the dissenters described the curtilage as "the area immediately surrounding [citizens'] homes" (slip op. 6 (Powell, J., dissenting)); as " 'an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling' " (*ibid.* (footnote omitted) (quoting *United States* v. *LaBerge*, 267 F. Supp. 686, 692 (D. Md. 1967)); as a "private family area" (*id.* at 7); and as "the private area immediately adjacent to a home" (*id* at. 9). The dissenters in *Dow* likewise explained that the purpose of the curtilage doctrine "is to identify the limited outdoor area closely associated with a home" (slip op. 11 (Powell, J., dissenting)).

B. THE CURTILAGE CAN EXTEND NO FARTHER THAN THE NEAREST FENCE SURROUNDING A HOUSE

It is, of course, desirable to define the curtilage in a way that will be "workable for application by rank-and-file, trained police officers" (*Illinois* v. *Andreas*, 463 U.S. 765, 772 (1983)) to the extent that a workable definition can be established without doing violence to the common law history of the curtilage doctrine and the values that underlie its use in the Fourth Amendment context. Indeed, this Court has emphasized that the curtilage should be a well-defined area (*Dow*, slip op. 9 n.3; *Oliver*, 466 U.S. at 182 n.12). A bright-line rule, consistent with the development of the curtilage doctrine, is sufficient to dispose of this case. Specifically, the curtilage should extend no farther than the nearest fence surrounding a fenced house. Although this definition does not dispose of cases in which there is no fence immediately surrounding the home, it provides a ready means of resolving the large number of cases in which defendants contend that the curtilage should extend beyond the yard fence and into areas that have not traditionally been accorded the status of curtilage.

Historically, "curtilage" has signified a fenced yard. "The word 'curtilage' from its origin has denoted only the inclosure surrounding a dwelling house" (*United States* v. *Vlahos*, 19 F. Supp. 166, 170 (D. Or. 1937) (footnote omitted); see also *United States* v. *Romano*, 388 F. Supp. 101, 104 n.4 (E.D. Pa. 1975); *Edwards* v. *Derrickson*, 28 N.J.L. 39, 72 (1859)). In its earliest usage, the word "signified the land with the castle and out-houses, enclosed often with high stone walls, and where the old barons sometimes held their court in the open air" (*Coddington* v. *Beebe*, 31 N.J.L. 477, 485 (1863)).

As property ownership in England became more widely dispersed, the term came to mean the fenced-in enclosure around any house, and the extent of the curtilage in burglary cases was determined by whether a structure was within or outside the protective fence around a house. For example, in *Rex* v. *Garland*, decided at Somerset Lent Assizes in Easter Term 1776, the judges found that a prisoner could not be convicted of burglary for breaking into an outhouse "separated [from the dwelling house] by an open passage eight feet wide: and * * * not connected with the said dwelling-house by any fence inclosing both" (2 E. East, *Pleas of the Crown* 493 (London 1803); see also 1 W. Hawkins, *Pleas of the Crown* 163 (T. Leach 6th ed. London 1777)). The fence rule provided an adequate safeguard against burglary for the areas and buildings that were part of the 18th-century English homestead, for it was customary in England to enclose all such buildings within "a fence or stone wall, enclosing a small piece of land embracing the yards and outbuildings near the house, constituting what is called the court[,] * * * so constructed as to add greatly to the security of the property within it" (*People* v. *Taylor*, 2 Mich. 250, 251 (1851); see also R. Davis, *Federal Searches and Seizures* § 1.321 (1964)).

Even in 18th-century England, however, there was not always a fence around the home, and the concept of curtilage was adjusted to deal with unfenced property. At Newcastle Summer Assizes in 1787, the court held that a burglary could be committed in a barn not within the same enclosure as a dwelling house because, although there was no wall around the property, the barn and dwelling were under the same roof (*R.* v. *Brown*, 2 E. East, *supra*, at 493). Numerous American courts, noting that the custom of erecting a protective wall had never fully taken hold in this country, devised rules for determining the curtilage when there was no enclosure. *E.g.*, *Wait* v. *State*, 99 Ala. 164, 13 So. 584 (1893); *Wright* v. *State*, 12 Ga. App. 514,

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77 S.E. 657 (1913); *State* v. *Bugg*, 66 Kan. 668, 72 P. 236 (1903); *People* v. *Taylor, supra*; *Bare* v. *Commonwealth*, 122 Va. 783, 794, 94 S.E. 168, 172 (1917). The tests that have come to be used to determine the extent of the curtilage were explicitly designed to take the place of the original, easily applied rule that the extent of the curtilage was determined by the yard fence. See *Hutchins* v. *State*, 3 Ga. App. 300, 59 S.E. 848 (1907).[8]

When there *has* been a fence surrounding a dwelling, courts applying both the common law and the Fourth Amendment have regarded that factor as important. "The presence of a fence or other boundary is an important factor, but not a controlling one, in determining the extent of the curtilage." R. Davis, *supra*, § 1.323; see *People* v. *Edwards*, 71 Cal. 2d 1096, 1101 n.2, 458 P.2d 713, 716 n.2, 80 Cal. Rptr. 633, 636 n.2 (1969) (en banc). Thus, numerous courts have held an outbuilding to be within the curtilage because, in addition to being close to the dwelling house, it was within (or formed part of) a common en-

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[8] The *Hutchins* court stated (3 Ga. App. at 304, 59 S.E. at 849 (emphasis added)):

> As the word "curtilage" is thus used [in English burglary cases] it always denotes an enclosure, including the dwelling-house. It is true that changed conditions in this country, and the absence of fences in many instances, may necessarily affect our definition so as not to render the presence of an enclosure indispensable. *But to supply the place of an enclosure, there must be apparent a necessity for the use of the outhouse alleged to be within the curtilage, either as a part of the dwelling-house, or that the use of such outhouse is indispensably necessary to the domestic comfort of the household in the occupancy of the dwelling.*

The court held that a barn 50 yards away from a dwelling house lay outside the curtilage even though there was no fence surrounding the yard of the dwelling house.

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closure with the dwelling house.[9] Other courts have held an area or outbuilding not to be within the curtilage because it lay outside an enclosure that included the dwelling house.[10] To our knowledge, no American court other than the court below has ever invalidated a search of an area separated from the dwelling house by a fence surrounding the dwelling house on the theory that the searched area was within the curtilage.[11]

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[9] *E.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981); *Roberson* v. *United States*, 165 F.2d 752, 754 (6th Cir. 1948); *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980); *Commonwealth* v. *Barney*, 64 Mass. (10 Cush.) 480 (1852); *People* v. *Griffith*, 133 Mich. 607, 608, 95 N.W. 719, 720 (1903); *State* v. *White*, 49 N.C. (4 Jones) 349, 352 (1857); *Russell* v. *State*, 37 Okla. Crim. 71, 256 P. 758 (1927); *State* v. *Russo*, 68 Or. App. 760, 764, 683 P.2d 163, 165 (1984).

[10] *E.g.*, *Patler* v. *Slayton*, 503 F.2d 472, 477-478 (4th Cir. 1974); *Brock* v. *United States*, 256 F.2d 55, 57 (5th Cir. 1958) (concrete house 150-180 feet away from residence and beyond fence surrounding residence was not within curtilage, whether or not residence was actually used as a dwelling house); *Hodges* v. *United States*, 243 F.2d 281, 283 (5th Cir. 1957) (chicken coop within enclosure 100 feet from exclusionary fence surrounding farm home was not within curtilage); *United States* v. *Sims*, 202 F. Supp. 65, 66 (E.D. Tenn. 1962) (pumphouse within fence enclosing dwelling house was within curtilage, but area outside that fence was not, even though within fence that surrounded entire 20-acre farm); *Holland* v. *State*, 11 Ala. App. 164, 65 So. 920 (1914); *State* v. *Wilson*, 2 N.C. (1 Hayw.) 242 (1795) (per curiam); *Luman* v. *State*, 629 P.2d 1275, 1276 (Okla. Crim. App. 1981).

[11] But cf. *Walker* v. *United States*, 225 F.2d 447, 448-449 (5th Cir. 1955) (barn 70-80 yards distant from dwelling and separated by a fence surrounding the barn was within curtilage). *Walker* is distinguishable both because the agents in that case entered the barn without a warrant and because the fence in that case surrounded the barn rather than the house. The fence therefore did not serve to define the area of intimate family activities, as is typically the case with yard fences around the home. In any case, we think it clear that *Walker* was wrongly decided and has engendered other erroneous rulings (see, *e.g.*, *Rosencranz* v. *United States*, 356 F.2d 310, 312 n.1, 313 (1st Cir. 1966); *United States* v. *King*, 305 F. Supp. 630, 634 (N.D. Miss.

Accordingly, it would be faithful to the common law and consistent with the curtilage doctrine as developed by the lower courts for this Court to hold that the innermost fence (if any) around a dwelling marks the outermost possible boundary of the curtilage. Such a rule would be readily administrable by police officers. And such a rule would be entirely consistent with the way that this Court has defined "curtilage." In all but the rarest case, by erecting a fence closely enclosing his home a property owner will have done exactly what the curtilage concept is designed to do—marked off as especially private, and associated with the intimate activities of family life, an area immediately surrounding the home.

Of course, it does not follow that all property within the innermost fence—no matter how far that fence is from the dwelling house—would be curtilage. See *Oliver*, 466 U.S. at 179. The location of a fence at some distance from the dwelling house rebuts any presumption that it demarcates the area that the property owner has determined is associated with the intimate activities of home life; in rural settings, such distant fences "are designed more to keep livestock under control than to keep people out." *State* v. *Stanton*, 7 Or. App. 286, 296, 490 P.2d 1274, 1279 (1971); see also *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *Giddens* v. *State*, 156 Ga. App. 258, 259, 274 S.E.2d 595, 597 (1980), cert. denied, 450 U.S. 1026 (1981). Moreover, a holding that the property owner could establish a curtilage by building a distant fence would be an open invitation to lawbreakers to restructure their property accordingly. As one state court put it, "To extend the concept of immunity

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1969)). See generally *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296 (7th Cir. 1976) (noting that *Walker* extends curtilage farther from home than any other federal appellate decision), cert. denied, 431 U.S. 930 (1977).

from unreasonable search and seizure so as to prohibit the search of any property included in a fenced area in which a dwelling may be located * * * would extend the protection afforded by the [C]onstitution to an absurdity." *Phillips* v. *State*, 177 So. 2d 243, 245 (Fla. Dist. Ct. App. 1965); see also *DeMontmorency* v. *State*, 401 So. 2d 858, 863 (Fla. Dist. Ct. App. 1981).

Under this analysis, the curtilage would be limited to the area within a yard fence around a house, if the property had such a fence. If not, the curtilage could not be defined as sharply, but it would still be limited to the "dwelling area"—the area immediately surrounding the house that is typically used for intimate activities associated with the home. In any event, as the *Oliver* case makes clear, the curtilage cannot be construed as extending to a huge area within a farm or ranch simply because the entire property, or some large portion of it, is surrounded by a perimeter fence.

Although there might be difficulties in defining the precise scope of the curtilage in a case involving no fence at all, or only a perimeter fence around a large portion of the property, those difficulties are not presented in this case, and they will not be presented in the typical case, where the extent of the yard around the house is readily apparent. The decision in *Oliver*, which indicates that, "for most homes, the boundaries of the curtilage will be clearly marked" (466 U.S. at 182 n.12; accord, *Dow*, slip op. 9 n.3), appears to preclude any rule that treats as curtilage an area—such as the area in this case—that is separated from the dwelling house by an exclusionary fence. The Fifth Circuit so concluded when this case was remanded for reconsideration in light of *Oliver*, holding that respondent's barn was outside the curtilage after "giving particular weight to the presence of the two separate fences plus a fenced-in open space between the large barn and the ranch house" (Pet. App. 7a-8a). By reversing

course and defining the curtilage by a "chancellor's foot" test, the Fifth Circuit has ignored this Court's jurisprudence. Instead, that court has created a definition of constitutionally protected curtilage that would be incomprehensible to those charged with applying the Fourth Amendment's commands, and would go far beyond the traditional definition of "curtilage" at common law and under the Fourth Amendment.

C. THE TRADITIONAL FACTORS USED TO DEFINE THE CURTILAGE DEMONSTRATE THAT RESPONDENT'S BARN WAS NOT WITHIN THE CURTILAGE OF HIS HOUSE

As noted above, we believe that, in cases such as this one involving a house enclosed by a yard fence, a bright-line rule is consistent with the common law and American case law, and is essential if the curtilage concept is to have any meaning to law enforcement officers in the field. Nonetheless, we recognize that the lower courts have generally applied a balancing test rather than a bright-line rule to determine the extent of the curtilage. Even under that balancing test, however, respondent's barn and the area surrounding it lay outside the curtilage.

The classic statement of the balancing test to determine the extent of the curtilage is found in *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956) (footnote omitted):

> Whether the place searched is within the curtilage is to be determined from the facts, including [1] its proximity or annexation to the dwelling, [2] its inclusion within the general enclosure surrounding the dwelling, and [3] its use and enjoyment as an adjunct to the domestic economy of the family.

See also *Ciraolo*, slip op. 7 (Powell, J., dissenting).

None of these three factors favors a determination that the barn was within the curtilage of respondent's house. As recognized by the court of appeals, "[t]he second factor, commonality of enclosure, militates against Dunn's contention that the barn was in the curtilage" (Pet. App. 7a). The third factor, use as an adjunct to the domestic economy of the family, likewise undercuts any claim that the barn was part of the curtilage of Dunn's house. In light of this Court's decisions, an outbuilding may be regarded as an adjunct to the domestic economy of the family only if it is in some way associated with the intimate activities of family life. Although a barn certainly is a typical feature of a farm or ranch, its purpose is to aid in farming, not to extend the area within which family life is carried on.[12] Thus, a barn presumptively is not part of the curtilage. And absolutely no showing was made in this case that the barn in question was used for any intimate family purpose. To the contrary, the record shows that the barn was on a property that respondent and his wife were in the process of purchasing, and that they and their children lived elsewhere (4 R. 163). Respondent's wife testified that the property was not yet used as a ranch or farm (*id.* at 164) and that the barn was used for "nothing" (*id.* at 165). The one use of the barn that the record discloses—its use as a drug laboratory—can hardly be called an intimate family purpose.[13]

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[12] See *Walker* v. *United States*, 225 F.2d 447, 453 (Rives, J., dissenting) ("any attempt to equate a man's barn with his dwelling must lower the dignity of the latter").

[13] See *United States* v. *Eng*, 753 F.2d 683, 686 (8th Cir. 1985) (following *Oliver*, marijuana patch lies outside curtilage because, among other factors, there is "no indication of domestic use and enjoyment"); *State* v. *Lee*, 120 Or. 643, 649, 253 P. 533, 534-535 (1927) (barn used only as distillery lies outside curtilage because it had no "family or domestic purpose"); *Hoppe* v. *State*, 122 Tex. Crim. 440, 55 S.W.2d 1053 (1932) (same).

The remaining factor is distance. The barn in this case was located 60 yards from the house, and 50 yards from the exclusionary fence surrounding the house (Pet. App. 3a, 7a, 19a, 51a). Although the courts of appeals have applied the distance criterion unevenly, the clear trend of the decisions suggests that 50 to 60 yards is too far from the house to be considered curtilage.[14] Regardless of the decisions of the courts of appeals, we submit that an area removed from the house by half a football field is unlikely to be the setting for the intimate activities of family life. See *Hester*, 265 U.S. at 58 ("open field" in which officers were situated was 50-100 yards from house).

In sum, even under a balancing approach the decision of the court of appeals has nothing to recommend it. The barn in this case lay outside the curtilage, and the DEA agents therefore did not violate the Fourth Amendment by walking up to the barn and shining their flashlights on the drug laboratory in plain view inside it.

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[14] The Seventh Circuit canvassed the case law in 1976 and determined that, with the exception of the Fifth Circuit's *Walker* decision, all federal appellate decisions had found areas within 75 feet (25 yards) of the dwelling to be curtilage and areas beyond 75 feet not to be curtilage. *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296 (1976), cert. denied, 431 U.S. 930 (1977). The attempt in *Bensinger* to set a per se 75-foot rule, however, has not been well received. See *United States* v. *Swart*, 679 F.2d 698, 702 (7th Cir. 1982) (rejecting "an absolute rule that anything beyond a specific distance from a dwelling or business is in an area unprotected by the Fourth Amendment"); *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981) (rejecting *Bensinger*). For an earlier and quainter distance rule, see 1 M. Hale, *Pleas of the Crown* *559 ("a bow-shot off from the house"). For a suggestion of a more complex, and rebuttable, distance rule, see Comment, *supra* note 5, 46 U. Pitt. L. Rev. at 816-818.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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